BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The Superior Court of Tuolumne County, California, entered judgment for Petitioner (R. 157), but without opinion. The opinion of the District Court of Appeal for the Third District of California was rendered August 29, 1942, and is reported in 54 Advance California Appellate Reports, 290; 128 Pac. (2d) 899; and is set out in the Appendix, pp. 1-16. The order of the Supreme Court of California denying Petitioner's Application for Hearing After Final Judgment of a District Court of Appeal was entered October 26, 1942 (R. 455), without opinion.

II.

JURISDICTION.

Jurisdiction is conferred upon this Court to review the judgment rendered below by writ of certiorari by subsection (b) of Section 237 of the Judicial Code, as amended, Section 1, 43 Stat. 937 (Title 28 U. S. C. A., Section 344).

The court below, the highest court in the State of California in which a decision could be had, has, by its final judgment adjudging Respondents to be the owners of the land in question, denied to Petitioner a right, title, immunity or privilege specifically set up and claimed by it under Section 77B of the Bankruptcy Act of June 7, 1934, c. 424, Section 1, 48 Stat. 912; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; Act of August 12, 1937, c. 589, Section 1, 50

Stat. 622 (Title 11 U. S. C. A., Section 207), in that Petitioner was vested with title to said lands by the orders and Final Decree of the bankruptcy court rendered in proceedings for the reorganization of Pickering Lumber Company under said statute. The court below has denied Petitioner's plea of *res judicata* of the orders and Final Decree in the bankruptcy proceedings vesting title in it and barring Respondent's claims, as specifically set up and claimed by Petitioner in this cause, thereby denying to it the right, title, privilege or immunity conferred on Petitioner by said orders and final decree of the bankruptcy court acting under said statute.

The jurisdiction of this Court to review the judgment below by certiorari under Section 237(b) of the Judicial Code, as amended, is sustained by the following decisions of this Court:

Stoll v. *Gottlieb*, 305 U. S. 165, 167;
Davis v. *Aetna Acceptance Corp.*, 293 U. S. 328;
Connell v. *Walker*, 291 U. S. 1;
Danciger & Emerich Oil Co. v. *Smith*, 276 U. S. 542;
Myers v. *International Trust Co.*, 273 U. S. 380;
Jones Nat'l Bank v. *Yates*, 240 U. S. 541;
Harrigan, Trustee, v. *Bergdoll*, 270 U. S. 560;
Nutt v. *Knut*, 200 U. S. 12;
Rankin v. *Barton*, 199 U. S. 228;
Fischer v. *Pauline Oil Co.*, 309 U. S. 294;
Lesser v. *Gray*, 236 U. S. 70;
Seabury, Receiver, v. *Green*, 294 U. S. 165;
Williams v. *Heard*, 140 U. S. 529;
Rector v. *City Deposit Bank*, 200 U. S. 405;
Eauclaire Nat'l Bank v. *Jackman*, 204 U. S. 522;
Motlow v. *State ex rel. Koeln*, 295 U. S. 97, 98;
Pittsburgh, C., C. & St. L. Ry. Co. v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507;
Des Moines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S. 552.

III.

STATEMENT OF THE CASE.

The statement of the case is set forth in the Petition for Certiorari, pp. 6-16, under the heading "Summary and Short Statement of the Matters Involved," to which reference is hereby made.

IV.

SPECIFICATION OF ERRORS.

1. The court below erred in holding that Petitioner's title to the lands was not vested and that Respondents' claims thereto were not barred by the Plan of Reorganization, as confirmed, and the Final Decree rendered by the Bankruptcy Court in proceedings for the reorganization of Pickering Lumber Company conducted under Section 77B of the Bankruptcy Act.

2. The court below erred in adjudging that Respondents were vested with the title to the real estate because Petitioner's title thereto became vested in it pursuant to the Plan of Reorganization as confirmed, and the Final Decree in the bankruptcy proceedings to which Respondents were bound.

3. The court below erred in not adjudging that the Plan of Reorganization, as confirmed, and the Final Decree in the bankruptcy proceedings were *res judicata* as to Petitioner's title to said real estate.

4. The court below erred in holding that Respondents, who had received notice of the bankruptcy proceedings, had participated therein and had invoked the jurisdiction of that court by intervention to compel execution of the Plan of Reorganization, were not parties to the proceedings and were not bound thereby.

5. The court below erred in holding that the bankruptcy court did not have jurisdiction to order the Duluth Bank, which was a party to the proceedings, to deliver the deed held by it in escrow.

6. The court below erred in holding, contrary to the record and the stipulated facts, that the Final Decree and the order dismissing Respondents' intervention were not entered simultaneously.

7. The court below erred in holding that the bankruptcy court had no jurisdiction to deal with the real estate which, under the undisputed facts, was in possession of the bankruptcy court at the commencement of the proceedings and when the Final Decree was entered and when all claimants to the real estate, including Respondents, were parties to the bankruptcy proceedings and made no challenge or objection to the jurisdiction of the bankruptcy court, the Plan of Reorganization or Final Decree and took no appeal therefrom.

8. The court below erred in holding that Respondents' relation as parties to the bankruptcy proceedings terminated with the dismissal in part of the intervening petition and that Respondents were not bound by the Order Confirming the Plan of Reorganization entered prior to such dismissal and by the Final Decree entered simultaneously with such dismissal.

V.

SUMMARY OF THE ARGUMENT.

A.

The bankruptcy court had jurisdiction to determine title to the real estate and to bar Respondents' claims thereto.

1. The Bankruptcy Court had Jurisdiction of the Parties (pp. 49-54).

2. The Bankruptcy Court had Jurisdiction to Determine Whether the Plan of Reorganization had Been Accepted by or on Behalf of Creditors Holding Two-Thirds in Amount of the Claims of Each Class Whose Claims had Been Allowed (pp. 54-56).

3. The Bankruptcy Court had Jurisdiction to Adjudicate the Title to the Real Estate (pp. 56-59).

4. The Provisions of the Order Confirming the Plan of Reorganization and in the Final Decree Barring all Creditors and Stockholders Who Had and Who Had Not Filed Their Claims, Except as Provided in the Plan of Reorganization, Were Manifestly Within the Power of the Bankruptcy Court (pp. 59-61).

B.

The order confirming the plan of reorganization and the final decree of the bankruptcy court whereby petitioner was vested with title and Respondents' claims were barred, were *res judicata* as to respondents (pp. 39-67).

VI.

ARGUMENT.

A.

The bankruptcy court had jurisdiction to determine title to the real estate and to bar Respondents' claims thereto.

1. The Bankruptcy Court had Jurisdiction of the Parties.

It was admitted by stipulation that the bankruptcy court gave notice to all creditors of all proceedings conducted therein (R. 173, 174, 176). It is also admitted that Respondents appeared at the hearing upon the fairness and feasibility of the Plan of Reorganization and in open court expressed approval thereof (R. 175). With no limitation on their appearance Respondents filed an intervening petition in aid of the execution of the Plan (R. 179). At no time in the bankruptcy proceedings did they

challenge the power of the bankruptcy court to approve and execute the Plan of Reorganization, which they knew expressly provided for the transfer of title to the lands to Petitioner in consideration of Petitioner delivering the securities prescribed by the Plan to the Duluth Bank and the Noteholders' Protective Committee, as assignees of the entire unpaid balance on the purchase contract, in satisfaction of such balance (R. 64).

Such appearances in the bankruptcy court by Respondents at the hearing on the feasibility and fairness of the Plan and their intervention to invoke the jurisdiction of the court in aid of the execution of the Plan subjected them to the jurisdiction of that court. In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, there was no such extended participation in the proceedings by the creditor there involved as there was by Respondents, yet this Court treated the creditor in that case as being a party to the proceedings because it had notice thereof and therefore had opportunity to assert its claims.

By their intervention, Respondents became parties to the proceedings for all purposes.

> *Alexander* v. *Hillman,* 296 U. S. 222, 241;
> *French* v. *Gapen,* 105 U. S. 509, 525;
> *Commercial Electrical Supply Co.* v. *Curtis,* 288 F. 657 (C. C. A. 8);
> *Swift* v. *Black Panther Oil & Gas Co.,* 244 F. 20, 29 (C. C. A. 8);
> *Rice et al.* v. *Durham Water Co.,* 91 F. 433, 434 (C. C. North Car.).

By their intervention Respondents recognized the validity of all orders which were made before the filing of the intervention.

U. S. v. *California Cooperative Canneries,* 279 U. S. 553, 556;
King v. *Barr,* 262 F. 56 (C. C. A. 9).

Inasmuch as Respondents did not question the jurisdiction of the bankruptcy court and did not in any way limit their appearance, their intervention had the effect of making binding on them all orders and judgments of the bankruptcy court entered before and after their intervention.

Bethke v. *Grayberg Oil Co.,* 89 F. (2d) 536 (C. C. A. 5);
Schwartz v. *Randolph,* 72 F. (2d) 892 (C. C. A. 4);
Rector v. *U. S.,* 20 F. (2d) 845 (C. C. A. 8);
Commercial Electrical Supply Co. v. *Curtis,* 288 F. 657, 659 (C. C. A. 8);
Phipps v. *Chicago, etc. Ry. Co.,* 284 F. 945, 955 (C. C. A. 8);
Swift v. *Black Panther Oil & Gas Co.,* 244 F. 20, 28 (C. C. A. 8);
First National Bank of Houston v. *Ewing,* 103 F. 168 (C. C. A. 5);
Frank v. *Wedderin,* 68 F. 818, 822 (C. C. A. 5).

Probably to avoid these principles the court below erroneously held that the order of the bankruptcy court confirming its temporary restraining order enjoining the Duluth Bank from selling the unpaid purchase contract, and in dismissing the intervening petition, divested the bankruptcy court of jurisdiction over Respondents (R. 445-446). It mistakenly stated in its opinion that the order dismissing the intervening petition was entered March 26, 1937, (R. 445) and the Final Decree was entered "after this" (R. 446). This holding is erroneous in factual basis

because it appears by the stipulation of the parties (R. 179-180) and by the record (Ex. 25, R. 332; Ex. 26, R. 333) that the order dismissing the intervention and the entry of the Final Decree were made simultaneously on March 27, 1937.

This Court is not bound by the erroneous finding thus made by the court below. On certiorari to the highest court of a state this Court has held that it will re-examine the facts as disclosed by the record because, when a federal right has been specifically set up and claimed in a state court, this Court will ascertain from the record not only whether such right was denied in express terms, but also whether it was denied in substance and effect. If such determination requires an examination of the evidence, then, under the rulings of this Court, such an examination will be made.

Norris v. *Alabama,* 294 U. S. 587, 590;
Drivers Union v. *Meadowmoor Co.,* 312 U. S. 287, 299;
Pierre v. *Louisiana,* 306 U. S. 354, 358;
Chambers v. *Florida,* 309 U. S. 227, 228;
Smith v. *Texas,* 311 U. S. 128, 130;
Chicago, G. W. R. Co. v. *Rambeau,* 298 U. S. 99, 101;
C. & O. R. Co. v. *Stapleton,* 279 U. S. 587, 590.

Examination of the record (R. 180) by this Court will disclose that the finding by the court below that the order dismissing the intervention was made prior to the entry of the Final Decree and not simultaneously with it contravenes both the stipulation and the record and requires a conclusion by this Court that the order dismissing the intervention and the entry of the Final Decree were made simultaneously.

Respondents were thus parties when the Final Decree was rendered and the ruling of the court below that Respondents had not entered their general appearance and were not parties is clearly erroneous. No decision can be found to support the ruling of the court below that a party who has once entered a general appearance in bankruptcy proceedings, without reservation or challenge to the bankruptcy court's jurisdiction, may withdraw and thereupon terminate that court's authority to adjudicate rights with which he is directly concerned. If a party may enter his appearance and withdraw when he desires, then an adjudication unfavorable to him would be impossible. Respondents reserved no such privilege and the law accords none to them. Therefore, either under the admitted facts or under the erroneous factual basis of the court below, Respondents were parties to the bankruptcy proceedings when the Final Decree was rendered.

Even were the case before the court on a direct appeal from the decree, Respondents would be held to have waived any right they might seasonably have asserted that the bankruptcy court did not have personal jurisdiction over them to summarily adjudicate title in the bankruptcy proceedings. Assuming that Respondents had a substantially adverse claim to the real estate and that they could have insisted that such claim be determined in a plenary suit, they nevertheless would be deemed to have waived such privilege because of their general appearance and their failure seasonably to have asserted such right in the bankruptcy court.

McDonald v. *Plymouth Trust Co.*, 286 U. S. 263;
Harris v. *Avery Brundage Co.*, 305 U. S. 160.

Respondents expressed approval of the Plan in open court and by intervention they sought the aid of the

bankruptcy court to execute the Plan. They made no insistence that the court could not proceed against them except by plenary suit. Therefore their general appearance and conduct was tantamount to consent that the bankruptcy court adjudicate all claims as it did and, as a consequence, even on direct appeal Respondents would be deemed to have waived any right to assert that the bankruptcy court did not have jurisdiction over them.

Jurisdiction over Respondents was a judicial fact which the bankruptcy court necessarily determined as a prerequisite to exercising jurisdiction to adjudicate the title. Manifestly, in a collateral proceeding this judicial determination is not subject to challenge.

Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U. S. 371;
Stoll v. *Gottlieb*, 305 U. S. 165.

2. The Bankruptcy Court had Jurisdiction to Determine Whether the Plan of Reorganization had Been Accepted by or on Behalf of Creditors Holding Two-Thirds in Amount of the Claims of Each Class Whose Claims had Been Allowed.

The Duluth Bank and the Noteholders' Protective Committee, as the holders of $300,000 principal amount of Whiteside notes, filed claims for the entire unpaid balance of $300,000 under the purchase contract (R. 171-174). Such claims were based upon the instruments of assignment executed by Whiteside wherein he assigned the entire unpaid balance of the purchase contract to the Duluth Bank in its capacity as trustee (R. 170). These claims of the Bank and the Noteholders' Protective Committee for the entire unpaid balance of the purchase contract were allowed by the bankruptcy court (R. 177) and were specifically classified by the court (R. 223) and the Plan made provision for their satisfaction (R. 64). The allowance of those claims necessarily involved de-

termination by the bankruptcy court of the legal effect of the execution of the assignments to the Duluth Bank. That court adjudicated that Whiteside had assigned the unpaid balance of the purchase contract and such assignment had clothed the Duluth Bank with plenary authority to collect the entire unpaid balance of the purchase price and to exercise such rights as Whiteside could have exercised had the assignment not been executed. It follows that the Duluth Bank, as assignee of the unpaid balance, was the proper party not only to prove the claim but to file written acceptance of the provision of the Plan dealing with the unpaid purchase price.

It has been held by this Court that an assignee of a creditor of a bankrupt possesses all of the rights which the assignor had, and may file claims therefor against the bankrupt.

Shropshire, Woodliff & Co. v. *Bush*, 204 U. S. 186.

It has been held that the holder of the claim is the proper party to prove a claim in bankruptcy proceedings.

Warburton v. *Trust Co. of America*, 182 F. 769 (C. C. A. 3), 169 F. 974;
In re Dunlap Carpet Co., 206 F. 726 (D. C. Pa.);
Assets Realization Co. v. *Sovereign Bank of Canada*, 210 F. 156 (C. C. A. 3).

Under subparagraph (e)(1) of Section 77B of the Bankruptcy Act it is provided that:

> "A plan of reorganization shall not be confirmed until it has been accepted in writing * * * by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan."

It is for the bankruptcy court to determine whether acceptance in writing has been given "by or on behalf

of" creditors holding two-thirds in amount of the claims of each class. It has been held by the lower federal courts that assignees of creditors may participate in the plan of reorganization.

> *Texas Hotel Securities Corp.* v. *Waco Development Co.*, 87 F. (2d) 395 (C. C. A. 5);
> *In re Pressed Steel Car Co.*, 16 F. Supp. 329 (D. C. Del.);
> *In re Indiana Central Tel. Co.*, 24 F. Supp. 342 (D. C. Ind.).

As such assignees the Duluth Bank and Noteholders' Protective Committee had the right to accept the Plan of Reorganization making provision for the satisfaction of the unpaid balance on the purchase contract in consideration of delivery of title to the lands to Petitioner and the adjudication of the court that the Plan of Reorganization was accepted was clearly within its jurisdiction under subparagraph (e)(1) of Section 77B.

3. The Bankruptcy Court had Jurisdiction to Adjudicate the Title to the Real Estate.

It is admitted that the real estate was in the possession of the Debtor at the commencement of the reorganization proceedings and when the Final Decree was entered by the bankruptcy court (petition, R. 2, cross-complaint, R. 9). Respondents, the Duluth Bank, as assignee, in its capacity as an owner of some of the Whiteside notes, and as trustee, the Noteholders' Protective Committee, as *cestui trustent,* and Debtor constituted the entire class of persons who could have asserted any claim to the real estate. Therefore the bankruptcy court had jurisdiction to deal with the real estate because of its possession by the Debtor and jurisdiction to bind the claimants to the

real estate who were parties to the bankruptcy proceedings.

Under subsection (a) of Section 77B of the Bankruptcy Act the bankruptcy court has exclusive jurisdiction of the Debtor and its property, wherever located, and may

> "exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature."

In *Thompson* v. *Magnolia Co.*, 309 U. S. 478, this Court held that a bankruptcy court, acting under Section 77 of the Bankruptcy Act dealing with the reorganization of railroads, had summary jurisdiction to deal with controversies relating to property in the actual possession of the bankruptcy court and that the test of the jurisdiction is not title, but possession by the bankrupt at the time of the filing of the petition in bankruptcy. This Court said (l. c. 481):

> "Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession and the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy. Here the trustee succeeded to the physical possession, custody and control of the right of way lands which the railroad had enjoyed at the time of the bankruptcy."

Also, in *Ex Parte Baldwin*, 291 U. S. 610, again dealing with Section 77 of the Bankruptcy Act, this Court held that (l. c. 616):

> "The jurisdiction extends also to the adjudication of questions respecting the title. *White* v. *Schloerb*, 178 U. S. 542; *In re Eppstein*, 156 Fed. 42."

The bankruptcy court, as a prerequisite to exercising jurisdiction to adjudicate title, must determine whether the property is in the possession of the court. This jurisdictional fact stands admitted and therefore it must be conceded that the court had jurisdiction to determine this question.

> *Harris* v. *Avery Brundage Co.*, 305 U. S. 160;
> *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 738;
> *Taubel, etc.*, v. *Fox*, 264 U. S. 426;
> *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1;
> *Herbert* v. *Crawford*, 228 U. S. 304;
> *Murphy* v. *John Hofman Co.*, 211 U. S. 562;
> *Whitney* v. *Wenman*, 198 U. S. 539.

Under subparagraph (h) of Section 77B of the Bankruptcy Act it is provided that upon confirmation of the plan the debtor or other corporation or corporations organized or to be organized shall have full power and authority to carry out the plan and the orders of the judge relative thereto, and

> "the property dealt with by the plan, when transferred and conveyed by the trustee * * * to the debtor or the other corporation or corporations * * * shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan * * *."

The Plan of Reorganization provided that in consideration of the delivery of securities Petitioner was to be

vested with the title to the real estate (R. 64). To accomplish this the Final Decree provided that the Duluth Bank, as escrowee of the deed executed by Whiteside conveying the real estate to Debtor, should deliver the deed to Petitioner (R. 331) and that Petitioner would be possessed of all of the property of every kind and character of Debtor (R. 331).

Inasmuch as the Duluth Bank was admittedly a party to the proceedings, the court had inherent power to compel it to make delivery of the deed in consideration of satisfaction being made of the entire unpaid balance of the purchase price under the purchase contract as provided in the Plan of Reorganization. Such plenary authority was conferred by subparagraph (h).

The property being in the possession of the Debtor when the petition was filed and the Final Decree entered, the bankruptcy court having summary jurisdiction under the Act to deal with all controversies respecting the real estate and all persons having any claims thereto being parties to the bankruptcy proceedings and making no challenge to the jurisdiction of the court, there can be no doubt that the adjudication of title by the bankruptcy court would be free from challenge even on direct appeal, and in a proceeding where the adjudication is collaterally attacked, there certainly can be no doubt that the bankruptcy court's determination of jurisdiction is free from attack.

4. The Provisions in the Order Confirming the Plan of Reorganization and in the Final Decree Barring all Creditors and Stockholders Who Had and Who Had Not Filed Their Claims, Except as Provided in the Plan of Reorganization, Were Manifestly Within the Power of the Bankruptcy Court.

The Order Confirming the Plan of Reorganization (R. 177) and the Final Decree (R. 179, Ex. 25, R. 237) pro-

vided that the claims of all creditors and stockholders, both those who had and who had not filed their claims, were barred from thereafter asserting any claim against the Debtor or its property (R. 330). It was within the power of the court under subparagraph (b) (9) of the statute to provide that the delivery of securities by Petitioner would be in full satisfaction of all claims under the purchase contract. It is provided under subparagraph (h) that when the property is transferred and conveyed, as required by the plan, to the debtor or a corporation to be organized, that such property

> "shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan."

Examination of the Plan and the confirming order discloses that no reservations were made, and consequently under this provision of the statute the court was vested with authority to bar Respondents' claims.

Likewise there can be no doubt as to the authority of the court to have entered the Final Decree barring the claims of Respondents. The Final Decree made express provision barring all such claims (R. 330). The effect of the Final Decree, wholly independent of any such provision, is stated by subsection (h) of the statute to be that

> "such final decree shall discharge the debtor from its debts and liabilities and shall terminate and end all rights and interests of its stockholders except as provided in the plan or as may be reserved as aforesaid."

The reservation "as aforesaid" deals with the reservation in the plan, and, there being no reservation in the Plan of Reorganization for Respondents, their claims

were properly barred by the Order Confirming the Plan of Reorganization and by the Final Decree.

B.

The order confirming the plan of reorganization and the final decree of the bankruptcy court whereby petitioner was vested with title and Respondents' claims were barred, were *res judicata* as to respondents.

The defense of *res judicata* of the order of confirmation and Final Decree specifically set up and claimed by Petitioner (R. 117, 118, 123-135) was denied effect by the court below (R. 447). Respondents had opportunity seasonably to contest the jurisdiction of the bankruptcy court or to challenge its adjudication by appeal. It is obvious that Respondents' claims to the real estate should have been addressed to the bankruptcy court. Instead, Respondents asserted no claims therein, but, by this suit, seek to have litigated issues which they knew were being adjudicated in the bankruptcy court. Furthermore, they urged that the bankruptcy court make the adjudication which they successfully challenged in the court below.

The following elements sustaining the defense of *res judicata* are established.

1. The real estate being in the possession of the Debtor, and Respondents and all of the other claimants to the real estate being parties to the bankruptcy proceedings, the bankruptcy court was authorized to adjudicate all controversies, as to title.

2. The Plan of Reorganization expressly dealt with the entire unpaid balance under the purchase contract (R. 64) and the provision therein made for the satisfaction of the claims thereunder was executed (R. 181) all of which Respondents had knowledge before the termination of the

bankruptcy proceedings so that they might have filed claims or objected seasonably.

3. By their personal appearance in the bankruptcy proceedings, the filing of their intervention, and because of notices given to them as required by the statute, Respondents were parties to the proceedings and had full opportunity therein seasonably to assert their objections to the Plan, the jurisdiction of the court and their claims to the real estate.

4. Although they were informed in time, Respondents asserted no objections to the provisions of the Plan dealing with the satisfaction of the claims under the purchase contract for the entire unpaid balance, the vesting of title to the lands in Petitioner or the jurisdiction of the bankruptcy court to make such determination.

5. The court had jurisdiction over the Duluth Bank which was a party to the proceedings and, in execution of the Plan, properly required delivery by it of the escrowed deed.

Respondents, having had the opportunity to assert their rights in the bankruptcy proceedings, cannot avoid the effect of the adjudication by remaining silent and then seek establishment of their claims in a subsequent suit. Fully supporting this contention is *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, where this Court was dealing with a similar contention as to the effect of a final decree of a federal district court rendered in proceedings to effect a Plan of Readjustment of the indebtedness of a drainage district under the Act of May 24, 1934, providing for "Municipal Debt Adjustment" (48 Stat. 798). The Chicot County Drainage District had effected a Plan of Readjustment under the Act. The court's decree recited that the plan had been accepted

by more than two-thirds of the outstanding indebtedness, was fair and equitable and made provision for the satisfaction of the obligations of the bonds affected by the Plan. The decree provided that unless the old bonds were deposited in court within one year they should be barred from participating in the Plan of Readjustment; the old bonds were canceled and the holders thereof were enjoined from asserting any claim thereon.

After the termination of the adjustment proceedings the bondholders instituted an action to recover on fourteen of the original bonds issued by the Drainage District and held by it. The Drainage District's claim that the final decree in the readjustment proceedings was *res judicata* was rejected by the Court of Appeals and this Court granted certiorari. The bondholders contended that the decree of the bankruptcy court was void because this Court, in a subsequent case, had held the Municipal Adjustment Act unconstitutional.

The evidence disclosed that the bondholder had notice of the proceeding, and this Court treated it as a party. However, the bondholder did not challenge the constitutionality of the statute under which the court was acting, it filed no claim in the proceedings, asserted no objection and took no appeal. This Court said (l. c. 375):

> "As parties, these bondholders had full opportunity to present any objections to the proceeding, not only as to its regularity or the fairness of the proposed plan of readjustment or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing

> the defense of *res judicata* are applicable these bondholders, having the opportunity to raise the question of validity were not the less bound by the decree because they failed to raise it."

Certainly the case at bar is much stronger than *Chicot County Drainage District* v. *Bank, supra,* because, in that case the basic authority of the court to act had been held unconstitutional and void.

All questions as to the authority of the bankruptcy court and the verity of its judgment on matters of law could have been seasonably asserted in that court by Respondents and if rejected by the bankruptcy court Respondents could have challenged the judgment on appeal, but Respondents wholly failed to make any claim, to enter objections or to take an appeal. Quite to the contrary, they expressed in open court their satisfaction with the Plan of Reorganization and by their intervention invoked the jurisdiction of the district court to bring about the execution of the plan. Having failed to raise the question in the bankruptcy proceedings to which they were parties, Respondents cannot relitigate those claims in this case. Respondents are bound by the bankruptcy proceedings because they failed to assert their claims after having opportunity to do so. This contention is sustained by the decision of this Court in *Chicot County Drainage District* v. *Bank, supra,* where this Court said (l. c. 378):

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar not only as respects matters actually presented

> to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' "

That the denial of Petitioner's defense of *res judicata* was clearly erroneous is sustained by the ruling of this Court in *Stoll* v. *Gottlieb,* 305 U. S. 165. There the petitioner, who was a stockholder in a corporation which was reorganized under Section 77B, had guaranteed the payment of bonds executed by the corporation. The plan of reorganization discharged the liability of petitioner on the guaranty. Respondent, as the holder of one of the bonds, moved to vacate confirmation of the plan, but, upon denial of that motion, he took no appeal. Instead, he instituted suit against petitioner in a municipal court of Chicago to recover on the guaranty. Petitioner's claim of *res judicata* was rejected by the state court and this Court granted certiorari. This Court held that the claim in the reorganization proceedings was *res judicata* and, as the contention was that the ruling below disregarded a decree of a court of the United States, a federal question was raised reviewable under Section 237(b) of the Judicial Code, as amended. This Court held that even if no affirmative conclusion as to jurisdiction had been made, such judgment may not be assailed collaterally. This Court said (l. c. 172):

> "After a party has his day in court with opportunity to present his evidence and his view of the law a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."

The bankruptcy court was authorized to determine any claims Respondents may have had to the real estate. In

fact, jurisdiction to make such determination was exclusively in that court under subparagraphs (a) and (o) of the statute. Having had the opportunity to litigate those claims in the bankruptcy court, Respondents are none the less bound because they did not choose to file any claim. This proposition is sustained by *Jackson* v. *Irving Trust Company,* 311 U. S. 494, 503, where this Court said:

> "However the issues were labeled the court was authorized to determine them. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 274; *Stoll* v. *Gottlieb, supra,* p. 171. And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 479; *Chicot County Drainage District* v. *Baxter State Bank, supra; Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 403. If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken."

These authorities establish that the bankruptcy court's adjudication of title was within its jurisdiction and is final and inasmuch as Respondents had full opportunity to have their claims determined in the bankruptcy proceedings they are nevertheless bound by the confirming order and Final Decree in those proceedings because they did not avail themselves of that opportunity by seasonably asserting their claims in the bankruptcy proceedings. Under the circumstances the rejection of Petitioner's plea of *res judicata* constitutes a denial of a right, title, privilege and immunity conferred by the bankruptcy pro-

ceedings conducted pursuant to the statute and therefore this Court has jurisdiction to review the judgment under Section 237(b) of the Judicial Code, as amended.

Conclusion.

Petitioner's title to the real estate was vested in it by the Plan of Reorganization and Final Decree entered in bankruptcy proceedings conducted under Section 77B of the Bankruptcy Act of June 7, 1934, c. 424, Section 1, 48 Stat. 912; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; Act of August 12, 1937, c. 589, Section 1, 50 Stat. 622 (Title 11 U. S. C. A., Section 207), and as the court below denied such title, Petitioner has been denied a right, title, privilege or immunity conferred by said federal statute. The Plan of Reorganization, as confirmed, and the Final Decree, as entered, by the bankruptcy court in such proceedings are *res judicata* as to every claim of Respondents and the denial of Respondents' plea of *res judicata* by the court below denied to Petitioner a right, title, privilege and immunity adjudged to Petitioner by said bankruptcy court acting under Section 77B.

Inasmuch as the rights of Petitioner under the federal statute and the bankruptcy court were specifically set up and claimed in the courts below, such rights and claims are substantial and were denied by the court below, this Court has jurisdiction under Section 237(b) of the Judicial Code, as amended, to grant a writ of certiorari to review such judgment. It is respectfully prayed that this Court

grant the writ of certiorari to review the judgment rendered by the court below.

Respectfully submitted,

MORRIS E. HARRISON,
PAUL BARNETT,
HENRY N. ESS,
Counsel for Petitioner.